APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED AND DECIDED NOVEMBER 2, 2000

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 99-4704

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID THOMPSON, a/k/a Bam,

Defendant-Appellant.

Appeal from the United States District Court
for the District of South Carolina, at Columbia.
Dennis W. Shedd, District Judge.
(CR-98-545-DWS).

Submitted: October 20, 2000

Decided: November 2, 2000

Before MICHAEL and TRAXLER, Circuit Judges, and
HAMILTON, Senior Circuit Judge.

* * *

Appendix A

OPINION

PER CURIAM:

David Thompson was convicted by a jury of three counts of being a felon in possession of a firearm in violation of 18 U.S.C.A. §§ 922(g), 924(a) (West 2000), and one count of possessing an unregistered modified shotgun in violation of 26 U.S.C. §§ 5841, 5861(d), 5871 (1994). On appeal, Thompson claims that the district court erred by: (1) denying a motion to sever the charges; (2) denying a motion for a directed verdict based upon the Government's failure to prove beyond a reasonable doubt that a firearm crossed state lines; (3) imposing a sentence based on a finding of certain facts beyond a pre-ponderance of the evidence; (4) increasing Appellant's base offense level based on a felony murder analysis; (5) upwardly departing from the Sentencing Guidelines based on a finding that Appellant's criminal history was inadequate; and (6) departing for extreme conduct in light of the allegation that the Sentencing Guidelines range was based on the same facts. Finding no reversible error, we affirm.

This Court reviews a district court's denial of a motion for severance under an abuse of discretion standard. *See United States v. Ford*, 88 F.3d 1350, 1361 (4th Cir. 1996). Offenses may be joined together in the same indictment if they "are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Fed. R. Crim. P. 8(a). Severance is warranted if the defendant would be prejudiced by the joinder. *See* Fed. R.

Crim. P. 14. The determination should weigh potential prejudice against the interests of judicial economy. *See United States v. Samuels*, 970 F.2d 1312, 1314 (4th Cir. 1992). When two or more offenses are joined because the offenses are of a same or similar character:

> three sources of prejudice are possible which may justify the granting of a severance under Rule 14: (1) the jury may confuse and cumulate the evidence, and convict the defendant of one or both crimes when it would not convict him of either if it could keep the evidence properly segregated; (2) the defendant may be confounded in presenting defenses, as where he desires to assert his privilege against self-incrimination with respect to one crime but not the other; or (3) the jury may conclude that the defendant is guilty of one crime and then find him guilty of the other because of his criminal disposition.

United States v. Foutz, 540 F.2d 733, 736 (4th Cir. 1976) (internal citations omitted).

We find that Thompson was not prejudiced by the joinder and the district court did not abuse its discretion by denying the motion for severance. Joinder was initially proper because the offenses were all of a same or similar character. There is no evidence that the jury was confused or cumulated the evidence. The evidence as to each count was simple and direct. Thompson admitted possessing the weapons relating to counts one, three and four.* (J.A. at 204-05, 213-14).

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* He denied owning the weapons.

Count two was supported by eyewitness and expert testimony establishing that Thompson possessed a silver revolver that traveled in interstate commerce. Furthermore, it is unlikely that the jury convicted Thompson based upon his criminal disposition. *See Samuels*, 970 F.2d at 1314.

We further find that there was substantial evidence supporting count two of the indictment. The interstate expert's opinion as to the fact that the revolver was not manufactured in South Carolina was based on his own experience, research and consultations. The district court did not abuse its discretion by permitting the expert to testify as to the basis of his opinion, as this was the type of information an interstate nexus expert would rely upon in order to arrive at an opinion. *See* Fed. R. Evid. 703; *see also United States v. Corey*, 207 F.3d 84, 87-91 (1st Cir. 2000); *United States v. Mann*, 712 F.2d 941, 942 (4th Cir. 1983). In addition, we agree with the district court's conclusion that Kelly's admission that there was a possibility that the revolver may have been manufactured in South Carolina did not compel the conclusion that the Government failed to prove its case.

We further find that Thompson's sentence was not affected by *Apprendi v. New Jersey*, 503 U.S. __, 2000 WL 807189 (U.S. June 26, 2000) (No. 99-478). Thompson's convictions each carried a maximum sentence of ten years' imprisonment. The district court did not impose a sentence for any of the convictions above the statutory maximum.

The district court found that Thompson's conduct with respect to count two of the charges involved possession of a revolver during the commission of another offense, attempted

murder, and cross-referenced USSG § 2X1.1. *See U.S. Sentencing Guidelines Manual* § 2K2.1(c)(1)(A) (1998). Pursuant to USSG § 2X1.1(a), the court applied the base offense level for assault with intent to commit murder under USSG § 2A2.1(a)(1) upon finding that the object of Thompson's conduct was first degree murder.

At sentencing, the district court's factual findings are reviewed under the clearly erroneous standard. *See United States v. Gormley*, 201 F.3d 290, 295 (4th Cir. 2000). This Court is reluctant to overturn the district court's factual findings. *See United States v. D'Anjou*, 16 F.3d 604, 614 (4th Cir. 1994). The court's interpretation of the Sentencing Guidelines is reviewed de novo. *See Gormley*, 201 F.3d at 295. We find no clear error in the court's factual findings. Furthermore, we find that the court did not err by applying the base offense level under USSG § 2A2.1(a)(1) on the basis that Thompson's conduct, if completed, would have amounted to felony murder.

We further find that the district court did not abuse its discretion by finding that Thompson's criminal history category did not adequately reflect his prior criminal conduct and the likelihood that he would engage in future criminal conduct. *See Koon v. United States*, 518 U.S. 81, 100 (1996) (review district court's decision to depart for abuse of discretion). An upward departure is warranted if the court finds that the defendant has an " 'extensive record' that is not adequately reflected by [his] Criminal History Category, or [ ] whose criminal background shows [him] to 'pose a greater risk of serious recidivism,' " *United States v. Blake*, 81 F.3d 498 (4th Cir. 1996) (quoting USSG § 4A1.3,

comment. (backg'd.)). A court may consider convictions, although too old in time to be assigned criminal history points, if the conduct of the prior convictions is similar to the current convictions. *See* USSG § 4A1.3, comment. (n.8).

Finally, we find that the district court did not abuse its discretion by increasing Thompson's base offense level because of extreme conduct under USSG § 5K2.8. Under USSG § 5K2.0, a departure outside the Sentencing Guidelines range may be warranted if "the court finds 'that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.' " (quoting 18 U.S.C. § 3553(b) (1994)). In order for a district court to depart, it must first consider whether the factor it believes warrants a departure is not to be used for such a purpose. *See* USSG §§ 5H1.1 to 5H1.12. On the other hand, if the Sentencing Guidelines state that the factor is to be considered as a basis for departure, the court may depart based upon the factor if the factor is not already considered in the Sentencing Guidelines. *See United States v. Hairston*, 96 F.3d 102, 105-06 (4th Cir. 1996). If the factor is encouraged as a basis for departure and taken into account by the Sentencing Guidelines, then the court may depart "only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present." *Koon*, 518 U.S. at 96.

A departure based upon extreme conduct is encouraged. In the instant case, the district court determined that Thompson's conduct was not within the heartland of conduct

encompassed by the cross-reference in USSG § 2K2.1(c). "Ordinarily, a determination of '[w]hether a given factor is present to a degree not adequately considered by the Commission' will be made 'in large part by comparison with the facts of other Guidelines cases.' Because of the 'institutional advantage' of district courts in making such factual determinations, appellate courts accord considerable deference to their departure decisions, limiting review on appeal to abuse of discretion." *United States v. Paster*, 173 F.3d 206, 217 (3d Cir. 1999) (quoting *Koon*, 518 U.S. at 98-100).

We affirm Thompson's convictions and sentences. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA DATED AND FILED SEPTEMBER 17, 1999

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Case Number: 3:98-545-001 (DWS)

UNITED STATES OF AMERICA

vs.

David "Bam" Thompson

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

John H. Hare, AFPD
Defendant's Attorney

THE DEFENDANT:

* * *

■ was found guilty on count(s) 1, 2, 3 and 4 of the superseding indictment on 1/13/99 after a plea of not guilty.

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Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 922(g) and 924(a)	see superseding indictment	3/28/98	1
18 USC 922(g) and 924(a)	see superseding indictment	4/4/98	2
18 USC 922(g) and 924(a)	see superseding indictment	4/6/98	3
26 USC 5481, 5861(d) and 5871	see superseding indictment	4/6/98	4

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

* * *

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

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Defendant's Soc. Sec. No.: 058-45-3208	September 10, 1999 Date of Imposition of Judgment
Defendant's Date of Birth: 7/31/60	
Defendant's USM No.: 94251-071	s/ Dennis W. Shedd Signature of Judicial Officer
Defendant's Residence Address: 16 Harrison Street Sumter, South Carolina 29150	Dennis W. Shedd, United States District Judge Name and Title of Judicial Officer
Defendant's Mailing Address: 16 Harrison Street Sumter, South Carolina 29150	September 17, 1999 Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of Three Hundred Sixty-five (365) months. This term consist of One Hundred Twenty (120) months as to count 1; One Hundred Twenty (120) months as to count 2, to run consecutive with count 1; One Hundred Twenty (120) months as to count 3, to run consecutive to counts 1 and 2; and Five (5) months as to count 4, to run consecutive to counts 1, 2 and 3.

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■ The defendant is remanded to the custody of the United States Marshal.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Three (3) years as to Counts 1 through 4, those terms to run concurrent.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

* * *

■ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

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6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer

to make such notifications and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant will make all checks and money orders payable to the "**Clerk, U.S. District Court**" unless otherwise directed by the court.

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

Assessment

Totals: **$ 400.00**

The above special assessment is due: immediately.

* * *

STATEMENT OF REASONS

Information on this page reflects ranges under Sentencing Guidelines and is used for statistical purposes only. Please refer to other pages in the judgment for the actual sentence.

■ The court adopts the factual findings and guideline application in the presentence report as amended.

* * *

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Guideline Range Determined by the Court:

Total Offense Level: 34

Criminal History Category: IV

Imprisonment Range: 210 to 262 months

Supervised Release Range: — to 3 years

* * *

■ Fine waived because of inability to pay.

* * *

■ The sentence departs from the guideline range:

* * *

■ for the following specific reason(s): Inadequacy of criminal history and likely to commit other crimes once released from incarceration.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED DECEMBER 11, 2000

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-4704
CR-98-545-DWS

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

DAVID THOMPSON, a/k/a Bam

Defendant – Appellant

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

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IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX D — RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND OTHER AUTHORITY

This case involves the Fifth and Sixth Amendments to the United States Constitution as well as various Federal Statutes and Sentencing Guidelines Rules of Procedure and Rules of Evidence.

1. The Fifth Amendment to the United States Constitution states in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Sixth Amendment to the United States Constitution states in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause

of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

3. 18 U.S.C. § 922(g) states in pertinent part:

It shall be unlawful for any person — (1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year; . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

4. 18 U.S.C. § 924(a)(2) states in pertinent part:

Whoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

5. United States Sentencing Guideline Chapter 1, Part A, Subsection (3) provides in pertinent part:

The Basic Approach (Policy Statement)

. . . Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders.